REG. v. AIK HOE & CO. LTD.

[O. Cr. J. (Whyatt C.J.) February 17 and 21, 1958]

[Singapore — Assize Case No. 63 of 1957]

Exchange Control — Infringement of s. 9(1) of the Exchange Control Ordinance (Cap. 216) — Act preparatory to making of payment outside Colony for credit of person resident outside scheduled territories without permission of Controller — When preparatory act is an offence — Meaning of "the making of a payment".

Interpretation — Policy of Ordinance — Enquiry into.

The accused were charged on 34 counts of having committed offences under section 9(1) of the Exchange Control Ordinance punishable under paras. 1(2) and 1(4) of Part II of the 5th Schedule to the said Ordinance. The facts of the case are shortly as follows: Between March 21 and June 11, 1957 Aik Hoe & Co. Ltd. received 34 cables from the Siam Panich Rubber Co. Ltd. of Bangkok. These cables instructed Aik Hoe & Co. Ltd. to cable M. Rothschild & Co. of New York to make payments to certain finance houses and banks in New York for the credit of Siam Panich Rubber Co. Ltd. The total amount involved in the 34 cables was U.S. $3,694,575. On receipt of these cables Aik Hoe & Co. Ltd. despatched cables to Rothschild's in exactly the same terms as the instructions in the cables from Siam. Rothschild's carried out the instructions in these cables and confirmed that they had done so by cable to "Camelco", Singapore the cable address of a firm called Yee Chang & Co. Ltd. These confirmatory cables were collected by Aik Hoe & Co. Ltd. but no further cable advice was sent by Aik Hoe & Co. Ltd. to the Siam Panich Rubber Co. Ltd. in Bangkok.

The learned Chief Justice in his Ruling on Law said that under section 9 of the Exchange Control Ordinance an act preparatory to the making of payments outside the Colony for the credit of persons resident outside the scheduled territories was an offence unless prior permission was obtained from the Controller.

The term "the making of a payment" means "the transfer of money by a payer to a payee." The transfer may be made in cash or by what is frequently the mercantile equivalent of cash, a cheque, or even, by the mere transfer of figures in an account. It may be made in respect of a past consideration or in respect of a future consideration, it may result in the extinction of a debt or in the creation of a credit; these, and no doubt many other different consequences may flow from a transfer of money by a payer to a payee, but whatever they may be, the transaction is still a payment in the ordinary meaning of that term.

Semble: The Court is not permitted to enquire into the policy of an Ordinance for the purpose of modifying the words of the Ordinance where the words which the Legislature has used are in themselves clear and unambiguous.

In his charge to the jury, the learned Chief Justice directed that "if a person in the Colony does an act preparatory to the making of a payment outside the Colony for the credit of a person resident outside the scheduled territories, it matters not that the effect of the payment will be merely to extinguish a credit, held with the payer and create a like credit with the payee, and further, it is immaterial whether the funds out of which the payment is to be made belong to a person resident in the Colony or some other scheduled territory, or to a person resident outside the scheduled territories."

A majority verdict (5 to 2) of guilty was returned by the jury at the trial. The Company which had previously been convicted for an offence under the former Finance Regulations Ordinance, 1950 was fined $25,000 on each of the 34 charges making an aggregate sum of $850,000.

CRIMINAL TRIAL.

Geoffrey Cross, Q.C. (*Tan Boon Chiang,* Crown Counsel, with him) for the Crown.

M. B. Brash (*T. E. Atkinson* with him) for the accused.

Whyatt C.J. (ruling on law) : — As it will be necessary in my charge to the jury to direct them on what I take to be the true meaning of section 9 of the Exchange Control Ordinance, upon which the prosecution and the defence take widely different views, I decided that the convenient course to follow in this trial was to direct counsel to make their submissions to me on the law at the conclusion of the evidence so that I could inform counsel, having heard their arguments, what my direction was going to be and my reasons for it, and counsel would then know, when they come to address the jury, what the law is as I have declared it to be.

I have now had the advantage of listening to a full argument from counsel for the prosecution and the defence and I have reached a clear conclusion as to the meaning and effect of section 9, the relevant provisions of which read as follows :—

> "Except with the permission of the Controller, no person shall in the Colony do any act which . . . . is preparatory to the making of a payment outside the Colony . . . . . for the credit of a person resident outside the scheduled territories."

It will be observed that the act which is prohibited and made an offence by this section is an act in the Colony which is preparatory to a further act, namely, making a payment outside the Colony for the credit of a person resident outside the scheduled territories. It would not, of course, have been competent for the legislature to make this further act outside the Colony an offence in Singapore because of the principle of extra-territoriality and it was no doubt because of the limitations which this principle imposes on enactments of the Singapore legislature, that the section was drafted so as to strike at the preparatory act done within the jurisdiction of the Colony.

It was agreed by the prosecution and the defence that the preparatory act, in order to be a prohibited act within the section, must be one which is preparatory to "the making of a payment outside the Colony", but there was a wide divergence of view as to what is meant by the words "the making of a payment" in this section. It should be remembered, in the first place, that payment is not a technical legal term. It is a word borrowed from the language of commerce,

and means, in its ordinary sense, the transfer of money by a payer to a payee. The transfer may be made in cash or by what is frequently the mercantile equivalent of cash, a cheque, or even, as has been held in one case, by the mere transfer of figures in an account. It may be made in respect of a past consideration or in respect of a future consideration, it may result in the extinction of a debt or in the creation of a credit; these, and no doubt many other different consequences may flow from a transfer of money by a payer to a payee, but whatever they may be, the transaction is still a payment in the ordinary meaning of that term. It was contended on behalf of the defence that if a person has a credit with a banker and as a result of his instructions, a payment is made to another banker so that he has a credit for the same amount with the new banker, such a transaction is merely a transfer of a credit and not a payment in the true sense of the word. The short answer to this argument is that it is not accurate to say, except perhaps in a colloquial sense, that a credit has been transferred in such circumstances since the true position is that an old credit has been extinguished and a new credit has been created, but leaving that point aside, it is clear that, whatever may be the result of the transaction from the point of view of the customer, as between the two bankers, one of them is a payer and the other is a payee, and hence it follows that the transaction is a payment in the true sense of the word. The word, payment, therefore is one of very wide meaning and there can be no doubt, in my view, that if it is not given a restricted meaning in section 9, it will cover any payment made outside the Colony, whether or not such payment is made from moneys belonging to a person resident in the Colony.

It was, however, strenuously contended on behalf of the defendant company that a restricted meaning should be placed on the word payment in section 9 and in support of this contention, the defence relied upon two broad submissions. First, it was said that the policy of the Ordinance was to protect the Colony's currency or, alternatively, the Sterling area currencies, and therefore the meaning of payment should be restricted so that payments outside the Colony from funds owned by persons resident outside the scheduled territories would not fall within the ambit of the section; and secondly, it was contended, a restricted meaning should be given to the word, payment, in order to avoid commercial absurdities and injustice.

The short answer to the first argument is that the Court is not permitted to enquire into the policy of an Ordinance for the purpose of modifying the words of the Ordinance where the words which the legislature has used are in themselves clear and unambiguous. If it had been the intention of the legislature to restrict the meaning of payment in the manner suggested, it would have been a simple matter for the legislature to have inserted qualifying words after "payment" or, alternatively, to have added a proviso to the section excluding from its operation all payments made outside the Colony from funds owned by persons resident outside the scheduled territories. But no such qualifying words or proviso were inserted or added by the legislature and for the Court to treat the section as if it had been so modified, would be not to interpret but to legislate.

The defence sought to re-inforce this part of their argument by reference to section 6 of the United Kingdom Exchange Control Act 1947 which is in *pari materia* with section 9 of the Singapore Ordinance and which, it was contended, prohibits the making of payments outside the United Kingdom by a United Kingdom resident for the credit of a person resident outside the scheduled territories only if the United Kingdom resident makes the payment from funds which he himself owns. This argument depends for its validity upon the assumption that section 6 would be construed by a United Kingdom Court in the manner suggested by the defence but no authority was cited in support of this view and indeed it is apparent that if the question should at any time come before a United Kingdom Court, it would not differ in its essentials from the question of construction raised by the defence on section 9 of the Singapore Ordinance and therefore it appears to me that no assistance is to be gained in the present proceedings by a reference to section 6 of the United Kingdom Act. So far, therefore, as the first head of the defence's submission is concerned, I reject the contention that the policy of the Ordinance requires the Court to give a restricted interpretation to this section.

I now turn to consider the second head of the defence's argument, namely, that a restricted meaning should be given to the word, payment, to avoid commercial absurdities and injustice. It is, of course, a well-recognised canon of construction that the Court may, indeed has a duty, to modify and even ignore the words of a statute if to give them their ordinary meaning would lead to absurdity. The defence cited a number of authorities in support of this rule of construction and the prosecution did not seek to dispute it in any way. The question I have to decide, however, is whether the rule has any applicability in the present case. The defence sought to establish that it was applicable by taking a number of illustrations, some of them hypothetical, others based on their version of the facts, which it was said showed that the wide

meaning contended for by the prosecution would lead to commercial absurdities. It was said, for instance, that if an American visitor to the Colony were to ask a Singapore lawyer to cable his bank in New York to transfer funds to Manila for the credit of his account there, the lawyer would, according to the prosecution, commit a criminal offence if he carried out the instructions, a result which it was contended, would be manifestly absurd. As a further example of the absurd and harmful results which would follow if the prosecution's view is correct, the defence referred to the position of an arbitrator in Singapore appointed under a contract between parties in Indonesia and the United States who, on this view of the law, would commit a criminal offence by publishing his award. Coming closer to the facts alleged in the present case, the defence argued that it would be absurd to give an interpretation to section 9 which would have the effect of making a person in the Colony who merely acted as a post office, relaying word for word to New York instructions received from Thailand, guilty of a criminal offence for performing such a service. If the person in Thailand could give instructions to New York direct, was it not absurd and unjust to hold that a person in the Colony, relaying the same instructions to New York, was doing something criminal? Lastly, it was said that the Controller had no interest in funds outside the sterling area held by persons resident outside the sterling area, and it was absurd to suggest that the section should be given an interpretation which would bring within its purview acts done in connexion with funds in which the Controller had no interest.

These arguments by way of *reductio ad absurdum* might have carried weight if section 9 had imposed an absolute prohibition on acts preparatory to the making of payments outside the Colony for the credit of persons resident outside the scheduled territories. But section 9 does no such thing. On the contrary it provides that a preparatory act shall be an offence only if it is done without the permission of the Controller. As counsel for the prosecution has rightly emphasised throughout this case, the scheme of the Ordinance is to cast the net wide and at the same time to provide administrative machinery by way of permits and exemptions granted by the Controller which will ensure flexibility in the working of the Ordinance and thus prevent anomalies and hardship. I agree that if section 9 is given the wide meaning contended for by the prosecution, it will have the effect of bringing under supervision and control every payment outside the Colony for the credit of a person resident outside the scheduled territories whenever an act preparatory to the making of such a payment is done in the Colony. It is probable that some of these payments will be innocent, it is certain that all of them will appear to be so. Such are the intricacies of foreign exchange and the ramifications of international finance it is not possible, merely by looking at the preparatory act if it takes the form of an isolated cable or letter, to say whether the payment to which it relates is innocent or not. Hence the legislature has provided that all such acts shall be brought under the control of the Foreign Exchange Controller by requiring the person doing the preparatory act to obtain his permission before embarking upon them. If the Controller is satisfied the transaction is innocent and harmless, he will, of course, give his permission, but if there are circumstances giving rise to a reasonable suspicion that the transaction is not all that it appears to be, or that certain documents have not been fully disclosed or that some relevant information is being withheld, he will, no doubt, enquire into the matter further or impose safeguards to ensure that the currency of the Colony is protected, before giving his permission. I see nothing absurd or unjust in such a procedure nor in an interpretation of section 9 which leads to such a result. It merely means that a person intending to do a preparatory act within the meaning of section 9 must first obtain the permission of the Controller and that anyone who fails to do so, acts at his peril.

For these reasons, therefore, I will, in my charge to the jury, direct them that if a person in the Colony does an act preparatory to the making of a payment outside the Colony for the credit of a person resident outside the scheduled territories, it matters not that the effect of the payment will be merely to extinguish a credit held with the payer and create a like credit with the payee, and further, it is immaterial whether the funds out of which the payment is to be made belong to a person resident in the Colony or some other scheduled territory, or to a person resident outside the scheduled territories.

[By a majority (5 to 2) the jury returned a verdict of guilty].

Whyatt C.J. (in passing sentence) : — I have given careful consideration to the plea in mitigation put forward by counsel for the defendant company and it is right that I should say that he has urged on behalf of his client all that could be properly said in extenuation of their offence in this case. He has rightly emphasised that the verdict of the jury, in view of my direction on the law, does not necessarily imply that they were of the opinion that the defendant company controlled the Bangkok company and he has

also pointed out that the evidence adduced by the prosecution does not prove that any specific quantity of foreign currency has been lost to the Colony.

But counsel for the defendant company seeks to carry his plea in mitigation further. He submits that I should proceed upon the assumption that the defendant company and its directors acted throughout in good faith and that I should assess the penalty for these 34 offences on that basis. I am quite unable to accede to this submission. In the first place, I have to bear in mind that the defendant company has a previous conviction for selling large quantities of U.S. dollars in 1951. The defendant company pleaded guilty in that case and the record shows that on that occasion also their counsel put forward the plea that the company had acted in good faith and in the honest belief that they were entitled to do what they did. The present case has a number of features in common with the previous case. Again there is a company in Bangkok, though it bears a different name, and again the defendant company claims to be acting merely as agent for the Bangkok company in giving instructions for the disposal of U.S. currency in New York. The mechanics of carrying out the transactions in the present case were more elaborate and complicated than in the previous case and I have no doubt that the reason for this was that the defendant company hoped that they would in consequence escape the attention of the Controller. The managing director of the defendant company was asked again and again when he was in the witness box why his company had used an accommodation address in Singapore for receiving cable advices from New York. He was quite unable to give a satisfactory or even a plausible explanation and I have no hesitation in saying that he was attempting to mislead the Court in this matter. The prosecution may not have proved the exact relationship between the defendant company and the Bangkok company in this case but they have certainly satisfied me that the defendant company and its responsible directors were not acting in good faith and in the genuine belief that they were entitled to carry out the transactions which are the subject matter of these charges.

This is therefore a case which calls for a heavy penalty. The substantial fines imposed on the occasion of the previous conviction have not deterred the defendant company from committing further numerous breaches of the foreign exchange control laws. If it should turn out that heavy fines are not sufficient to deter wealthy companies from committing breaches of the foreign exchange control laws, it is well to remember that the Ordinance expressly provides that where a company commits an offence, its directors are also deemed to be guilty of that offence unless they can prove that it was committed without their consent or connivance and that they took all reasonable means to prevent its commission; and it should also be remembered that if a director were charged under these provisions he would be liable, on conviction, not merely to a fine but to imprisonment.

On the previous occasion when the defendant company was convicted the Court imposed a heavy fine of $420,000. Bearing this in mind and having regard to the number of occasions and the large sums involved in the present charges, I consider that a substantially heavier fine, at least double that which was imposed on the previous occasion, should be imposed in this case. I therefore impose fines totalling $850,000, that figure being the aggregate of a fine of $25,000 which I impose on each of the 34 charges.

Order accordingly.

Solicitors: *Allen & Gledhill.*

GAN SIN TUAN v. CHEW KIAN KOR

[C.A. (Thomson C.J., Whyatt C J. (S) and Hill J.) June 20, 1957]

[Penang — F.M. Civil Appeal No. 42 of 1956]

Companies — Private Company — Contract to sell shares in private company contrary to articles of association — Contract void — Whether contract takes effect as sale of equitable rights.

On January 28, 1950 the appellant and respondent entered into an agreement whereby the appellant agreed to sell to the respondent his holding of 2,340 shares in the United Traction Company Ltd. for the sum of $46,800. The United Traction Company Ltd. was a private limited company and its articles of association contain restrictions on the transfer of shares, the effect of which was to require a proposing transferor to give notice to the company of his intention to transfer his shares, and thereafter to constitute the company his agent to sell the shares to other members of the company or other persons selected by the company, at a value fixed by the auditors, and only if the company failed to find a purchaser, was the proposing transferor at liberty to sell his shares to any person at any price. Both the appellant and the respondent knew of the restrictions in the articles of the company. The respondent duly paid the purchase money and the appellant handed to him the share certificate in respect of the shares. The appellant refused to execute a transfer of the shares and on August 21, 1953 his solicitors wrote to the respondent stating that as the agreement for the sale of the shares was contrary to the articles of association, it was bad in law and therefore the appellant could not transfer the shares but would return the purchase price of $46,800. The respondent however refused to accept the return of the purchase price and eventually brought an action claiming specific performance of the contract to sell the shares or further or alternatively a declaration that the appellant was a trustee of the shares or further or alternatively damages for breach of contract. The trial Judge held that the appellant had entered into a valid contract to sell the shares for which he received the purchase price. He